No. 17-333

In The Supreme Court of the United States

O. JOHN BENISEK, *ET AL.*,
Appellants,

V.

LINDA H. LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, *ET AL.*,
Appellees.

On Appeal from the
United States District Court
for the District of Maryland

BRIEF FOR *AMICUS CURIAE* SENATOR JOSEPH B. SCARNATI, III IN SUPPORT OF APPELLEES

Jason Torchinsky
Counsel of Record
Phillip M. Gordon
Holtzman Vogel
Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809 (Fax)
Jtorchinsky@hvjt.law
Pgordon@hvjt.law

Brian S. Paszamant
John P. Wixted
Blank Rome LLP
130 North 18th Street
Philadelphia, PA 19103
(215) 569-5500
(215) 569-5555 (Fax)
Paszamant@BlankRome.com
JWixted@BlankRome.com

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Appellants Lack Standing Because They Fail to Allege an Invasion of a Legally Protected Interest. 5

a. Partisan Gerrymandering Imposes No Burden on an Individual Citizen's First Amendment Rights and Therefore Does Not Cause Any Injury. 7

b. Appellants Are Misguided in Their Reliance on *Anderson*, *Rutan*, and *Gralike*. 10

c. The Concept of "Vote Dilution" Cannot Support a First Amendment Retaliation Claim in the Partisan Gerrymandering Context. 13

II. Partisan Gerrymandering Claims and Racial Gerrymandering Claims Cannot and Should Not be Harmonized. 16

a. Congress Intervened in the Racial Gerrymandering Context and Not the Partisan Gerrymandering Context. 17

b. Race is a Protected Class Afforded Strict Scrutiny by the Courts While Partisanship Is Not. 20

c. Partisan Gerrymandering is a Defense to Claims of Racial Gerrymandering 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Agre v. Wolf, 2018 U.S. Dist. LEXIS 4316 (E.D. Pa. Jan. 10, 2018) 20

Anderson v. Celebrezze, 460 U.S. 780 (1983) 10, 11

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 6

Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 20

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 6

Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Ca. 1988) 8, 9, 10

Benisek v. Lamone, 266 F.Supp. 3d 799, 809-14 (2017) 7, 15

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 19

Brandenburg v. Ohio, 395 U.S. 444 (1969) 20

Brecht v. Abrahamson, 507 U.S. 619 (1993) 19

Bush v. Vera, 517 U.S. 952 (1996) 22

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) 10

Cook v. Gralike, 531 U.S. 510 (2001) 12

Cooper v. Harris, 137 S. Ct. 1455 (2017) 22

Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) 9

Davis v. Bandemer, 478 U.S. 109 (1986) 9

Easley v. Cromartie, 532 U.S. 234 (2001) 22

Elrod v. Burns, 427 U.S. 347 (1976) 7

Gaffney v. Cummings, 412 U.S. 735 (1973) 21

Harris v. McCrory, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016) 23

League of Women Voters v. Quinn, No. 1:11cv-5569, 2011 U.S. Dist. LEXIS 125531 (N.D. Ill. Oct. 28, 2011) 8

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5, 6, 9

NAACP v. Button, 371 U.S. 415 (1963) 7

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) 8, 9

Reynolds v. Sims, 377 U.S. 533 (1964) 13

Rutan v. Republican Party, 497 U.S. 62 (1990) 11

Shaw v. Reno, 509 U.S. 630 (1993) 18, 21

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 10

Thornburg v. Gingles, 478 U.S. 30 (1986) 13

Vieth v. Jubelirer, 541 U.S. 267 (2004) 14, 21, 22

Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981) 9

White v. Regester, 412 U.S. 755 (1973) 13, 18

CONSTITUTION AND STATUTES

U.S. Const. amend. XV, § 1 17

U.S. Const. amend. XV, § 2 17

U.S. Const. art. 1, § 4, cl. 1 17

U.S. Const. art. III, § 2 5

2 U.S.C. 2c 19

42 U.S.C. § 1973 18

52 U.S.C. § 10301 ..... 17, 18

Apportionment Act of 1842, 5 Stat. 491 (1842) 19

Apportionment Act of 1872, 17 Stat. 492 (1872) 19

Apportionment Act of 1901, 26 Stat. 736 (1901) 19

Apportionment Act of 1911, 37 Stat. 13 (1911)..... 19

Permanent Apportionment Act of 1929, 46 Stat. 21 (1929)..... 19

RULES

Fed. R. Civ. P. 12(h)(3)..... 6

OTHER AUTHORITIES

Geoffrey Skelley, *Just How Many Obama 2012-Trump 2016 Voters Were There?*, Rasmussen Reports (June 01, 2017)..... 14

David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2016 and 2012 Elections*, DAILY KOS, (Nov. 19, 2012)..... 15

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, Senator Joseph B. Scarnati, III ("Senator Scarnati"), in his official capacity as President Pro-Tempore of the Pennsylvania Senate, is a defendant in three separate partisan gerrymandering lawsuits aimed at invalidating Pennsylvania's congressional districting plan before the 2018 elections. Senator Scarnati, in his official capacity, presides over the branch of the Commonwealth's Government to which Article I, Section 4 of the U.S. Constitution assigns responsibility for congressional redistricting.[1]

The substantial legal uncertainty caused by numerous, conflicting lower court decisions and lack of certainty from this Court concerning the appropriate standard under which to evaluate partisan gerrymandering claims (if any) harms Senator Scarnati, as a defendant in these actions, by forcing him to defend himself and Pennsylvania's congressional districting legislation without a known, clear, and fixed standard. The current legal landscape also makes it impossible for Senator Scarnati and the rest of the Pennsylvania General Assembly to know what is and is not permissible in any court-ordered redrawing of the congressional

---

[1] No party's counsel authored any part of this Brief. No person other than the *amicus curiae* made a monetary contribution to fund the preparation or submission of this Brief. Blanket consent to file *amicus* briefs was filed on December 26, 2017 and January 5, 2018, respectively.

map. Therefore, a ruling here will directly impact *amicus*.

SUMMARY OF ARGUMENT

While there are many reasons why Appellants' First Amendment retaliation claim must fail, this *amicus* Brief focuses on two. First, Appellants lack standing to bring their claims because they have not suffered a "concrete and particularized" injury. In describing the harm they purport to have suffered, Appellants allege: (1) the mapmakers who created the Maryland Sixth Congressional District intended to burden Appellants' First Amendment rights by increasing the number of registered Democrats within that district; and (2) the votes of Appellants (who are Republicans) were "diluted" as a result. But Appellants have suffered no harm because no person or group of persons is ever guaranteed electoral success, which is effectively what Appellants are demanding. Furthermore, the concept of "vote dilution" cannot support a First Amendment retaliation claim in the partisan gerrymandering context because: (a) the drawing of district lines to increase the number of people affiliated with a particular political party does not diminish any individual's ability to campaign or vote for the candidate of his or her choice; and (b) political affiliation is a mutable characteristic, which means that gauging the nature and duration of harm (if any) caused by a decrease in the number of people from one political party in a single congressional district is an impossible task.

Second, Appellants' claim must fail because Appellants improperly rely upon the law governing racial gerrymandering to buttress their position. Appellants argue that this Court should uphold their First Amendment claim in order to "harmonize" the two areas of jurisprudence. But partisan and racial gerrymandering claims are conceptually and legally distinct for multiple reasons. First, race is a protected class and partisan affiliation is not. Second, Congress has legislated in the racial gerrymandering context, but has never done so in the partisan gerrymandering context. Third, this Court has recognized partisanship as a *defense* to a racial gerrymandering claim, meaning any attempt to bring partisan gerrymandering claims within the ambit of the law governing racial gerrymandering will necessarily conflict with this Court's own precedent.

For the reasons set forth in this Brief, Senator Scarnati requests that this Court dismiss for lack of subject-matter jurisdiction, or in the alternative, find for Appellees.

ARGUMENT

Appellants ask this Court to adopt a novel approach that would recognize a partisan gerrymandering cause of action in the form of a First Amendment retaliation claim. The proposed elements of this claim were put forward by the district court and adopted by Appellants. According to the district court, a party that advances a First Amendment retaliation claim to challenge a districting plan as an impermissible partisan gerrymander must demonstrate the following elements: (1) the mapmakers "redrew the lines of [a] district with the *specific intent* to impose a burden on [the plaintiffs] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concreate adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." Brief of Appellees at 16 (quoting J.S. App. 104a); *see also* Brief of Appellants at 6-7, 35 (quoting J.S. App. 104a) (emphasis in original).

The district court and Appellants, however, both proceed from the flawed assumption that increasing or decreasing the likelihood that a candidate of a certain political party will be elected violates the First Amendment rights of any voter. This assumption is entirely unsupported by this Court's case law. As explained in detail below, partisan gerrymandering neither burdens voters nor

dilutes votes in any constitutionally cognizable manner.

Appellants also attempt to conflate the legally distinct issues of partisan and racial gerrymandering via their proposed First Amendment retaliation claim. The fact that Congress has intervened in the racial gerrymandering context has created significant problems with Appellants' position because race is a protected class, and because partisan gerrymandering has always been a defense to racial gerrymandering claims. Senator Scarnati therefore requests that the Court dismiss this suit for lack of subject matter jurisdiction, or in the alternative, find for Appellees.

I. Appellants Lack Standing Because They Fail to Allege an Invasion of a Legally Protected Interest.

To maintain standing under Article III of the U.S. Constitution, a plaintiff's claims must present a "case" or "controversy." U.S. Const. art. III, § 2. Fundamentally, "the party invoking federal jurisdiction bears the burden of establishing" the following: (1) "[T]he plaintiff must have suffered an injury in fact"; (2) "[T]here must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court"; and (3) "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61

(1992) (internal quotations and alterations omitted). An "injury in fact" requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotations and citations omitted).

An individual does not "state an Article III case or controversy" if a plaintiff raises "only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangible benefits him than it does the public at large . . . ." *Id.* at 573-74. A lack of standing goes to the heart of the jurisdiction of the federal courts and "cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). All federal courts, including this Court, have "an obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Because Appellants have failed to show a concrete and particularized, actual and imminent injury in fact, their claim must be dismissed.

a. Partisan Gerrymandering Imposes No Burden on an Individual Citizen's First Amendment Rights and Therefore Does Not Cause Any Injury.

The first element the district court advanced for a partisan gerrymandering First Amendment retaliation claim is a showing that mapmakers "redrew the lines of [a] district with the *specific intent* to impose a burden on [the plaintiffs] and similarly situated citizens because of how they voted or the political party with which they were affiliated." Brief of Appellants at 6 (quoting J.S. App. 104a) (emphasis in original).

There is no "'doubt that [the] freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First . . . Amendment[].'" *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)). However, this Court has previously held that the First Amendment is implicated only "to the extent" that government action "compels or restrains belief and association . . . ." *Id.*

Here, there is no evidence that any individual citizen, voter, or group of voters was restrained from associating, speaking, voting, volunteering, or organizing in relation to congressional elections in the Maryland Sixth Congressional District. *See Benisek v. Lamone*, 266 F.Supp. 3d 799, 809-14 (2017). In the absence of such evidence, Appellants

fail to state a claim. *See, e.g., League of Women Voters v. Quinn*, No. 1:11cv-5569, 2011 U.S. Dist. LEXIS 125531, at *12-13 (N.D. Ill. Oct. 28, 2011) ("The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate."); *Pope v. Blue*, 809 F. Supp. 392, 398-99 (W.D.N.C. 1992) (rejecting freedom of association claim because there is no "device that directly inhibits participation in the political process."); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Ca. 1988) ("Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice.").

Appellants contend that they have "demonstrated an actionable burden . . . by showing that the 2011 Maryland gerrymander accomplished precisely the practical objectives that the mapmakers intended it to. That is, the gerrymander has changed the outcomes of the elections in 2012, 2014, and 2016 . . . ." Brief of Appellants at 52. In other words, despite Appellants' argument to the contrary, *see* Brief of Appellants at 48-49, Appellants contend that they have been harmed because the Maryland Sixth Congressional District has not elected candidates from their preferred political party.

The First Amendment "guarantees the right to participate in the political process; it does not guarantee political success." *Badham*, 694 F.Supp. at 675. Since there is no constitutional right to

electoral success, there is no burden here and therefore no injury. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[A]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district . . . . This is true even in safe districts where the losing group loses election after election."). Numerous other courts have agreed, both before and after *Bandemer*. *See, e.g., Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) ("The First Amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's view to the electorate do not include entitlement to success in those endeavors."); *Pope*, 809 F.Supp. at 397 (adopting the reasoning from *Bandemer* that "the power to influence the political process is not limited to winning elections.") (quoting *Bandemer*, 478 U.S. at 132); *Badham*, 694 F.Supp. at 669 ("[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult[.]") (quoting *Bandemer*, 478 U.S. at 131-132); *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977).[2]

---

[2] Appellants also allege that they have been burdened because the alleged gerrymander "has disrupted and depressed Republican political engagement[.]" Brief of Appellants at 19, 52. This argument likewise lacks merit. First, this issue is not properly before this Court because the Republican Party is not a party to this litigation. *See Lujan*, 504 U.S. at 560 ("[A] *Plaintiff* must have suffered an 'injury-in-fact'") (emphasis added). More importantly, the showing of a burden on a political party's associational rights typically requires

b. Appellants Are Misguided in Their Reliance on *Anderson*, *Rutan*, and *Gralike*.

Appellants offer no support for the proposition that the failure of their preferred political party's candidates to win an election presents a constitutionally cognizable burden under the First Amendment. The three decisions that Appellants rely upon are inapposite in that they pertain to ballot access or political patronage, not partisan gerrymandering.

First, in *Anderson v. Celebrezze*, the Ohio Secretary of State refused to place an independent presidential candidate on the ballot because the candidate missed the statutory filing deadline. 460 U.S. 780, 782-83 (1983). The State treated party

---

compelled association or non-association. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-17 (1986). Furthermore, the fact that some voters may feel discouraged by a lack of political success is not evidence that those voters have been penalized for expressing their beliefs. *See Badham*, 694 F. Supp. at 675 ("While plaintiffs may be discouraged by their lack of electoral success, they cannot claim that [the apportionment legislation] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected expression."). In this case, it cannot be reasonably alleged that the State of Maryland has forced people, either directly or indirectly, to refrain from engaging in the political process. If this Court were to accept Appellants' "depressed political engagement" argument, then nearly every district that switches parties after a reapportionment—or merely votes overwhelmingly for one party or the other in a single election—would be immediately constitutionally suspect.

candidates and independent candidates differently in terms of ballot access. *Id.* Candidates of recognized, major parties would automatically appear on the ballot if they were nominated at their party's convention. *Id.* Independent candidates, however, were required to file by the March deadline for primary candidates. *Id.* at 798-800. This Court held that treating candidates for President of the United States differently on the basis of party affiliation (or lack of party affiliation) impermissibly burdens the freedom of expression by *denying ballot access*. *Id.* at 793-94. Thus, *Anderson* dealt with the denial of citizens' right *to vote for* (not elect) a non-major party candidate because state law served to exclude those candidates from the ballot. Appellants in this case do not claim that they are unable to vote for the candidate they prefer, as was the case in *Anderson*. Rather, Appellants complain that their preferred, major party candidate is supposedly unable to win an election. *See* Brief of Appellants at 1-3. This is a monumental distinction.

Next, in *Rutan v. Republican Party*, the Governor of Illinois issued an executive order that in effect created a *de facto* political patronage system for state government employment in Illinois. 497 U.S. 62, 64-66 (1990). In finding the patronage practice unconstitutional, the Court found that "[e]mployees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs . . . ." *Id.* at 74. The Court found that individuals were denied specific employment benefits – i.e., public benefits –

on the basis of their political affiliation. These are exactly the type of concrete and particularized harms that give rise to a constitutional cause of action (and which are completely absent in this case). The ability to vote for a candidate, and to then see that candidate win an election, is in no way comparable to protected employment rights and benefits.

Third, in *Cook v. Gralike*, Missouri adopted an amendment to the state's constitution which required congressional candidates to pledge and actively seek legislation to enact a federal constitutional amendment on term limits. 531 U.S. 510, 514-15 (2001). Any candidate who refused would have a disclaimer placed next to his name on all general and primary ballots indicating that the candidate refused to support term limits. *Id.* Notably, *Gralike* was decided under the Elections and Qualifications Clauses and *not* the First Amendment. *See id.* at 523-526. Nevertheless, Appellants claim, without evidence or citation, that "[g]errymandering imposes the same sort of burden as the one that was at issue in *Gralike*." *See* Brief of Appellants at 42. This is plainly not true, as *Gralike* concerned a burden that was placed on congressional candidates, not voters, and, unlike this case, expressly addressed a state infringement upon candidates' speech on the basis of belief (i.e., the state required that candidates either support term limits or have an admonishing disclaimer placed next to their name on the primary ballots).

In sum, there are no workable parallels between this Court's precedents and what Appellants now propose.

c. The Concept of "Vote Dilution" Cannot Support a First Amendment Retaliation Claim in the Partisan Gerrymandering Context.

Appellants' attempt to apply the concept of "vote dilution" in the partisan gerrymandering context must fail. Vote dilution arises in two contexts. First, it occurs most frequently in the *racial* gerrymandering context. *See Thornburg v. Gingles*, 478 U.S. 30, 87 (1986) (White, J. concurring) ("The phrase 'vote dilution,' in the legal sense, simply refers to the impermissible discriminatory effect that a . . . districting plan has when it operates 'to cancel out or minimize the voting strength of *racial* groups.'") (quoting *White v. Regester*, 412 U.S. 755, 765 (1973)) (emphasis added). Second, vote dilution occurs in the one-person, one-vote context. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted."). In the first case, the Court held that a voter's vote cannot be diluted on the basis of the voter's race – an immutable characteristic. In the second case, the Court held that districts must have roughly equal numbers of voters so that each

individual's vote carries the same weight. A voter's partisan affiliation resembles neither of these situations.

As Justice Scalia wrote in *Vieth*, vote dilution is "a term which usually implies some actual effect on the weight of the vote." 541 U.S. at 297 (plurality op.). Here, the drawing of district lines to increase the number of people affiliated with a particular political party does not diminish any individual's power or ability to vote for the candidate of his or her choice. A partisan gerrymander therefore has no effect on the weight of an individual's vote.

In addition, political affiliation or preference can change—even in the context of a single election, where individuals may vote for presidential and congressional candidates from different parties—so any attempt to gauge the nature and duration of "harm" caused by a decrease in the number of people from one political party in a congressional district is an impossible task. *Id.* at 287 ("Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.").[3]

---

[3] Split ticket voting is actually quite common in federal elections. For example, in the 2016 Presidential election, 11%-15% of voters who voted for President Obama subsequently voted for President Trump. *See* Geoffrey Skelley, *Just How Many Obama 2012-Trump 2016 Voters Were There?*, RASMUSSEN REPORTS (June 01, 2017), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_geoffrey_skelley/just_how_many_obama_2012_trump_2016_voters_were_there.

In sum, Appellants have failed to allege any constitutionally cognizable harm arising from the alleged "dilution" of Republican voters. Therefore, their claim should be dismissed.[4]

There were also a significant number of congressional districts that voted for a member of one party for Congress but voted for the opposite party's candidate for President. As such, the following congressional districts were held or gained by Democrats but won by President Trump in 2016: Arizona 1st; Illinois 17th; Iowa 2nd; Minnesota 1st, 7th, and 8th; New Hampshire 1st; New Jersey 5th; New York 18th; Nevada 3rd; Pennsylvania 17th; and Wisconsin 3rd. *See* David Nir, ***Daily Kos Elections' Presidential Results by Congressional District for the 2016 and 2012 Elections***, DAILY KOS, (Nov. 19, 2012), https://www.dailykos.com/stories/2012/11/19/1163009 /-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections.

The following congressional districts were held or gained by Republicans but won by Secretary Clinton: Arizona 2nd; California 10th, 21st, 25th, 39th, 45th, 48th, and 49th; Colorado 6th; Florida 26th, and 27th; Illinois 6th; Kansas 3rd; Minnesota 3rd; New Jersey 7th; New York 24th; Pennsylvania 6th and 7th; Texas 7th, 23rd, and 32nd; Virginia 10th; and Washington 8th. *Id.*

[4] It is worth noting that the factual record in the district court shows that the Maryland Sixth Congressional District is not a "safe" district for Democrats. Congressman Delany, the current incumbent, won his seat in 2014 by only 1.5% of the vote. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 810 (D. Md. 2017). This further undermines the argument that Appellants have been deprived of the ability to influence candidates and elections.

II. Partisan Gerrymandering Claims and Racial Gerrymandering Claims Cannot and Should Not be Harmonized.

Appellants encourage this Court to adopt their proposed First Amendment retaliation framework in part to "harmonize[] the law of partisan and racial gerrymandering" because "[l]ike the harms that underlie a racial gerrymandering claim, the harms that underlie [Appellants' claim] are personal." *See* Brief of Appellants at 44-45 (internal quotations omitted). Appellants contend that alignment of these very different forms of gerrymandering is appropriate for two reasons.

First, Appellants contend that their First Amendment partisan gerrymandering claim is akin to a racial gerrymandering claim because both seek to challenge only the congressional district in which the aggrieved parties live, thereby alleviating any standing concerns inherent in a challenge to an entire state-wide map. Brief of Appellants at 44-45. Second, Appellants believe their First Amendment retaliation framework will close what they perceive to be "loopholes" in the law of gerrymandering. *Id.* at 45-46. They argue that by prohibiting partisan gerrymandering under the First Amendment, legislators can no longer engage in racial gerrymandering by disguising it as partisan gerrymandering. In addition, citizens who have been adversely affected by partisan gerrymandering would no longer feel compelled to present their claims as racial gerrymanders in order to secure judicial relief.

There are three principal reasons why Appellants' attempt to link racial and political gerrymandering claims must fail. First, Congress, under the power granted in Article 1, § 4 and the Fifteenth Amendment to the Constitution, intervened in the racial gerrymandering context by passing the Voting Rights Act of 1965. Second, race is a protected class, partisan affiliation is not. Third, racial and partisan gerrymandering claims are irreconcilable because partisanship has always been a defense to racial gerrymandering claims.

a. Congress Intervened in the Racial Gerrymandering Context and Not the Partisan Gerrymandering Context.

Article 1, § 4 of the Constitution of the United States grants state legislatures the power to determine the "Times, Places, and Manner of holding Elections." However, "Congress may at any time by law make or alter such Regulations." U.S. Const. art. 1, § 4, cl. 1. The Fifteenth Amendment provides that "[t]he rights of citizens . . . to vote shall not be abridged by the United States or any State on account of race [or] color . . . ." U.S. Const. amend. XV, § 1. The Fifteenth Amendment also grants Congress the "power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. Congress subsequently invoked the Fifteenth Amendment provisions to enact the Voting Rights Act of 1965 (VRA), which it amended in 1982. *See* 52 U.S.C. § 10301.

As evidenced by the various voting protections now in place, racism and race-based voting restrictions have a long history in the United States. *See Shaw v. Reno*, 509 U.S. 630, 639-41 (1993) (concise explanation of the history of race-based voting restrictions and implementation of the VRA). In *Shaw*, this Court recognized that the Fourteenth Amendment is violated when "members of a racial minority group vote as a cohesive unit [but] practices such as multimember or at-large electoral systems . . . reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice." *Id.* at 641; *see also White*, 412 U.S. at 765-66 (The Court has "entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups."). Congress in 1982 amended the VRA "to prohibit legislation that *results* in dilution of a minority group's voting strength, regardless of the legislature's intent." *Shaw*, 509 U.S. at 641. (emphasis in original) (citing 52 U.S.C. § 10301 (transferred from 42 U.S.C. § 1973)).

It is axiomatic that the VRA and this Court's precedents exist due to the history of race-based voting discrimination practices in the United States. This fact alone belies Appellants' contention that "the harms that underlie a racial gerrymandering claim . . . are personal" in a way that is at all similar to what harms, if any, exist in the partisan gerrymandering context. *See* Brief of Appellants at 45. More importantly, however, the fact that Congress has intervened in the racial gerrymandering context and not the partisan gerrymandering context is indicative that these two

separate bodies of law should not, and cannot, be "reconciled." Congress' limited use of its authority to enact legislation in this area, which is within its plenary power under the Elections Clause, counsels against judicial intervention here. *See e.g.* 2 U.S.C. 2c (fixing the number of members of congress and requiring single member districts); Apportionment Act of 1842, 5 Stat. 491 (1842) (Representatives "should be elected by districts composed of contiguous territory equal in number to the number of Representatives to which each said state shall be entitled, no one district electing more than one Representative."); Apportionment Act of 1872, 17 Stat. 492 (1872) (adding the requirement that districts should have "as nearly as practicable an equal number of inhabitants."); Apportionment Act of 1901, 26 Stat. 736 (1901) (adding a compactness requirement to apportionment); Apportionment Act of 1911, 37 Stat. 13 (1911) (fixing the number of House members at 433 with allowances should Arizona and New Mexico be admitted as states); Permanent Apportionment Act of 1929, 46 Stat. 21 (1929) (removed all congressionally mandated standards such as compactness, etc.).

It is generally understood that this Court is "reluctant to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993). However, when it is abundantly clear that Congress has a "prolonged and acute" awareness of a well-known, high profile issue and has failed to act, that failure to act provides "added support" for Congress' acquiescence. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-601 (1983). In this instance "[t]here is no dispute that the Framers gave

Congress direct authority to make or alter regulations for the manner of electing congressional representatives." *Agre v. Wolf*, 2018 U.S. Dist. LEXIS 4316, *72 (E.D. Pa. Jan. 10, 2018). "The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules." *Arizona State Leg. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015). Congress has declined to act in the partisan gerrymandering context in any way that compares to the Voting Rights Act. In fact, for over 200 years Congress has been well aware that partisan gerrymanders can and do occur, but has deferred to the authority of state legislatures. Therefore, the lack of Congressional interference in this area is strong evidence that partisan and racial gerrymandering are not comparable and ought not be treated as comparable. Therefore the two types of claims ought not be harmonized.

b. Race is a Protected Class Afforded Strict Scrutiny by the Courts While Partisanship Is Not.

"Harmonizing" racial and partisan gerrymandering would presumably mean subjecting partisan gerrymanders to strict scrutiny.[5] This Court

[5] Appellants' Brief does not specify which level of scrutiny Appellants believe should govern First Amendment partisan gerrymandering claims. However, it is safe to assume that Appellants believe strict scrutiny should apply given their assertion that the State's action constitutes a content-based speech restriction. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

has previously rejected this level of scrutiny for partisan gerrymanders and should once again do so here.

As a plurality of this Court has recognized, "[i]t is elementary that scrutiny levels are claim specific." *Vieth*, 541 U.S. at 294 (plurality op.). The disparate treatment of individuals on the basis of race is subject to strict scrutiny. *See Shaw*, 509 U.S. at 650, 653. However, as this Court made clear in *Shaw*, "nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Id.* at 650. Therefore, while discrimination "on the basis of race receives the strictest scrutiny under the Equal Protection Clause . . . discriminat[ion] on the basis of politics does not." *Vieth*, 541 U.S. at 293 (plurality op.).

The Court's historic refusal to apply strict scrutiny to partisan gerrymandering claims is especially appropriate given that the power of reapportionment under the Election Clause is delegated to state legislatures, which are inherently political bodies, and that "[p]olitics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412

U.S. 735, 753 (1973); *see also Vieth*, 541 U.S. at 358 (Breyer, J., dissenting) (acknowledging that "political considerations will likely play an important, and proper, role in the drawing of district boundaries."). Given that strict scrutiny "readily, and almost always, results in invalidation," *Vieth*, 541 U.S. at 294, one would be hard pressed to think of any legislative or congressional map that would survive in such a system. This Court should reject Appellants' invitation.

c. Partisan Gerrymandering is a Defense to Claims of Racial Gerrymandering.

As recently as last year, this Court recognized partisan gerrymandering as a defense to racial gerrymandering claims. *See Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017) (part of proving a racial gerrymandering claim is "demonstrating that the legislature subordinated other factors—compactness, respect for political subdivisions, *partisan advantage* . . .—to racial considerations.") (emphasis added) (quotation marks omitted). *Cooper* is just the latest in a series of decisions from this Court concluding that political motivations are a complete defense to racial gerrymandering allegations. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("'If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify'") (quoting *Bush v. Vera*, 517 U.S. 952, 968 (1996)). Appellants' position would require the Court to explain how partisanship can be defense in the racial gerrymandering context yet also be a First

Amendment violation in the partisan gerrymandering context. In fact, this Catch-22 was rejected by the district court in *Harris v. McCrory*, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016).

Simply put, to suggest that this Court has for decades treated *a violation of the First Amendment* as an affirmative defense to a racial gerrymandering claim is inconceivable. Far from being reconcilable with this Court's racial gerrymandering jurisprudence, Appellants' partisan gerrymandering claim is simply incompatible with that jurisprudence. Accordingly, Appellant's claim must be dismissed.

CONCLUSION

For the above reasons, Senator Scarnati respectfully asks that this matter be dismissed for lack of subject-matter jurisdiction or, in the alternative, affirm the district court's ruling without adopting its reasoning.

Respectfully submitted,

Jason Torchinsky
Counsel of Record
Phillip M. Gordon
Holtzman Vogel
Josefiak Torchinsky
PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Jtorchinsky@hvjt.law
Pgordon@hvjt.law

Brian S. Paszamant
John P. Wixted
Blank Rome LLP
130 North 18th Street
Philadelphia, PA 19103
Phone: 215-569-5500
Facsimile: 215-569-5555
Paszamant@BlankRome.com
JWixted@BlankRome.com